

In the July 13, 2007, Order, Judge Benedict rejected claimant's testimony that on December 2, 2006, she experienced a pop in her right shoulder and experienced an immediate onset of severe pain while lifting an ice bucket because claimant failed to tell

any co-workers at the time of the alleged incident and, furthermore, failed to relay that history at the emergency room later that evening. Nonetheless, the Judge found claimant presented credible evidence that her symptoms began at work and, in the absence of alternative theories about how the shoulder injury occurred, the Judge found it was more probably true than not claimant's shoulder injury arose out of and in the course of her employment with respondent. Consequently, the Judge granted claimant's request for temporary total disability benefits and medical benefits.

Respondent contends Judge Benedict erred. Respondent argues that once claimant's testimony about injuring her shoulder lifting an ice bucket is discredited, there is nothing in the record to establish that claimant's work activities caused her injury. Accordingly, respondent requests the Board to reverse the July 13, 2007, Order.

Conversely, claimant requests the Board to affirm the Order. Claimant argues she has proven her claim through her testimony, the medical treatment records, and the expert opinion of Dr. Dick Geis.

The only issue before the Board on this appeal is whether claimant sustained an accidental injury that arose out of and in the course of her employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned finds and concludes:

On December 2, 2006, claimant was employed by respondent, a coffee and sandwich business, primarily to run a cash register, deliver food to customers, clean tables, and stock. Claimant alleges that after missing a week of work due to strep throat she arrived at work on Saturday morning, December 2, 2006, at approximately 9:00 a.m. and had no symptoms or pain in her right shoulder or neck. Indeed, claimant testified that before that day she never had any problems in her shoulders or neck.

According to claimant, around noon on December 2, 2006, her right arm popped as she was lifting a small bucket of ice approximately waist high to empty into a soda cooler. Claimant testified, in part:

Q. (Mr. Cooper) Okay. Okay. I interrupted you. You come into work at nine o'clock, tell us what happened after that?

A. (Claimant) I came in and clocked in and got my register ready and started my duties. I usually -- if there's somebody else on the register I come in, I go clean the

tables, I stock, empty trash and stuff like that, make sure everything is all, you know --

Q. Okay.

A. -- tidied up. And a couple times I always fill the ice and after the second time that I went to go fill the ice I brought it out to put it in the dispenser and my arm popped when I put it up into the dispenser.¹

The record is not entirely clear how big the ice bucket was that claimant was lifting. But a co-worker, Yvonne L. Duncan, testified it was big enough that she would not fill it with ice as it would be too heavy. Ms. Duncan testified, in part:

Q. (Mr. Cooper) Because it [the ice bucket] is too heavy if you fill it up?

A. (Ms. Duncan) For me, yes.

. . . .

Q. If you fill it up fairly full, is it heavy?

A. Yes, it can be. Yes, a lot of ice. I just know my weight limit because my arm hurts me at times. I don't fill it all the way.²

Claimant's testimony is uncontradicted she continued to work and that she traded duties with a co-worker so she could operate the cash register until the co-worker's shift ended. According to claimant, the day of the incident she told her co-workers about her shoulder problems. As claimant was leaving work that day she spoke with the night manager, Audra Jackson, who suggested that claimant complete an incident report. Claimant testified she declined to complete the report as her "ride was already an hour-and-a-half late."³

Respondent presented the testimony of several witnesses who either worked with or saw claimant on December 2, 2006. Roxann Castellan, who was the acting store manager and claimant's supervisor at the time of claimant's alleged accident, initially testified claimant appeared ill upon arriving at work and later said something about her neck, arm, and back hurting as the day progressed. Upon further questioning, however,

¹ P.H. Trans. at 15.

² Duncan Depo. at 8, 9.

³ P.H. Trans. at 17.

Ms. Castellan indicated claimant made those complaints approximately 30 minutes after arriving at work and before she would have handled the ice bucket. Ms. Castellan testified, in part:

Q. (Mr. Karns) When she first came in, what did you observe about her?

A. (Ms. Castellan) I went up to the front and I just looked at her. She had said something about her eye being bruised. I didn't even notice it, but it was bruised and swollen. She said her husband had crushed her skull years ago and it just started hurting again for some reason.

Q. Did she make any comments to you about her physical condition?

A. She was sick at that point, too. She had been gone for about a week or so, and then said as the day went on, something about her neck and her arm and her back hurt on the same side.

Q. Okay. Now, your statement says about 30 minutes later she started complaining. Was that about 30 minutes after she had come in?

A. Right.

Q. And at that point she started complaining about what?

A. It was just her eye, that side of her face at that point.

Q. Not at the beginning but about 30 minutes later after she came in?

A. She said her neck and her shoulder and her back.

Q. And at that point in time, 9:00, 9:30 in the morning, would she have filled the ice bin at that point?

A. No.⁴

In addition, respondent's night manager, Audra Jackson, testified she spoke with claimant at the end of claimant's shift on December 2, 2006, and claimant was rubbing her neck and shoulder area. Claimant stated she had thought she had hurt "it."⁵ Ms. Jackson testified that when she asked claimant if the injury occurred at work, claimant replied she did not know as "it" had hurt for several days. But the written statement Ms. Jackson

⁴ Castellan Depo. at 6, 7.

⁵ Jackson Depo. at 5.

prepared on December 6, 2006, stated that claimant made shoulder and back complaints because of something she did at work. Moreover, Ms. Jackson then offered claimant an incident report to complete and report a work-related injury.

The evening of December 2, 2006, claimant went to the St. Francis emergency room for treatment. Claimant reported to the emergency room that her right shoulder pain began at approximately noon. But the emergency room records indicate claimant denied that she had experienced any specific trauma or injury at work.

This is a 32 year old white female complaining of as above times 6 hours. Pt is accompanied by son. Pt developed a gradual onset of pain that is constant, dull and radiating from her right lateral neck to her right lateral shoulder. Pt states pain is located in the right trapezius and is rated at [a] 9. Pt states pain is aggravated by motion and improved by rest.

Upon further questioning, Pt also reports she went to work at 9 am this morning and was asymptomatic. Patient states around noon today she started developing some right trapezius pain which has been persistent. She states it radiates from the insertion to the origin and is exacerbated with motion. Patient denies any specific trauma or injury at work. Patient declines to file this as a worker injury at this time. Patient notes that she has been off work the last week secondary to strep throat.⁶

Other documents from the St. Francis emergency department generated from claimant's December 2, 2006, visit indicate claimant was complaining about right arm pain and popping and pain into her neck and back. Moreover, those records also indicate claimant was unsure whether her symptoms were work-related.

The St. Francis emergency department advised claimant to follow-up with a Dr. Smith in orthopedics on the following Monday. But she was also diagnosed as having a right trapezius strain and told to return to the emergency department if her symptoms either worsened or remained the same.

The next day claimant visited the Stormont-Vail emergency room for her shoulder complaints. The records generated from that visit likewise indicate claimant developed shoulder pain at work the previous day and that she again denied experiencing any specific trauma or injury at work. Stormont-Vail provided claimant with a sling and pain medication. Claimant denies telling the Stormont-Vail emergency room personnel that she did not experience any injury or trauma at work.

⁶ P.H. Trans., Cl. Ex. 1.

Also on Sunday, December 3, 2006, claimant told Ms. Duncan that she had hurt her shoulder lifting the bucket of ice. Ms. Duncan, who knew claimant before claimant commenced working for respondent, also testified that she was not aware that claimant had any right shoulder problems before the alleged December 2, 2006, incident.

On Monday, December 4, 2006, claimant reported to work but she was sent home because she was wearing her sling. On that day, claimant advised respondent's owner that the shoulder problem should be turned in as a workers compensation injury. Shortly afterwards, claimant sought legal counsel.

Claimant's attorney referred claimant to Dr. Dick Geis for an evaluation. The doctor examined claimant the first time on December 13, 2006, and later on March 22, 2007. Dr. Geis diagnosed claimant as having right shoulder strain and possibly a rotator cuff injury, right upper back strain, cervical strain, and possibly complex regional pain syndrome. The doctor recommended x-rays of the cervical and thoracic spine, an MRI of the right shoulder, an EMG of the right arm, medications, and physical therapy.

Respondent countered with the opinions of Dr. Dale G. Garrett, who examined claimant on February 22, 2007, and who determined claimant had right shoulder and neck pain but it was not related to work. The doctor also concluded claimant displayed both symptom magnification for secondary gain and drug seeking behavior.

Considering the record compiled to date, the undersigned finds the July 13, 2007, Order should be affirmed. The present record establishes that it is more probably true than not that claimant was asymptomatic on December 2, 2006, when she arrived at work. The record also establishes that sometime during her shift, claimant began to experience pain in the area of her right shoulder and neck. Claimant reported to the St. Francis emergency department that she was experiencing pain that had commenced at approximately noon on that day, which would have been during claimant's shift. From those records, it appears claimant was reluctant to claim her injuries as being work-related. Accordingly, from those records it does not appear that claimant was attempting to perpetrate a fraud upon respondent.

At this juncture, it is unclear whether claimant hurt her shoulder due to repetitive trauma or whether it was injured in one particular incident. But we do know that claimant's job entailed lifting a bucket of ice that was heavy when filled and that claimant asked a co-worker to switch job duties so claimant could operate the cash register. But more importantly, the written statement prepared by Ms. Jackson on December 6, 2006, states that claimant related her symptoms to work. In conclusion, the evidence establishes claimant either injured or aggravated her neck and shoulder at work. Consequently, claimant is entitled to receive workers compensation benefits for an accidental injury that arose out of and in the course of employment with respondent.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned Board Member affirms the July 13, 2007, Order entered by Judge Bryce D. Benedict.

IT IS SO ORDERED.

Dated this ____ day of October, 2007.

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Larry G. Karns, Attorney for Respondent and its Insurance Fund
Bryce D. Benedict, Administrative Law Judge

⁷ K.S.A. 44-534a.